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FRANKLIN COUNTY CLERK

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR FRANKLIN COUNTY

13-2-51170-6

MARION E. LIBBY, Petitioner, vs. STATE OF WASHINGTON Respondent	)	Case No. ORDER DENYING SHOW CAUSE ON PETITION FOR WRIT OF HABEAS CORPUS AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

THIS MATTER, having come before the undersigned upon the Petition for Writ of Habeas Corpus, and Petitioner's request that the Court issue an order directed to the Respondent to appear before the above-named Court and show cause why the relief requested in said petition be granted, and the undersigned, having considered the same, the undersigned hereby:

FINDS that the Petition for Writ of Habeas Corpus is frivolous for the reasons hereinafter stated: Petitioner claims that RCW 9A. 44.040 (or other statute under which he was convicted) is not valid because the codification of that statute, as found in the Revised Code of Washington (RCW), does not include enacting language or a proper title. However, petitioner has not examined, reviewed or analyzed the bills actually adopted by the legislature and signed by the

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governor. In the absence of proof that the bills are constitutionally deficient, the Petition for Writ of Habeas Corpus is baseless.

Also, see attached decision of the Court of Appeals in the matter of State of Washington v. Wallmuller, 164 Wash.App. 890, 265 P.3d 940 (2011), wherein the Court of Appeals denied Mr. Wallmuller's direct appeal of the same claims as were made in this case, and the attached decision of the Washington State Supreme Court in the matter of Wallmuller v. Uttecht, 171 Wn 2d 1016 (2011), wherein the Supreme Court found those claims to be frivolous and dismissed the Petition for Writ of Habeas Corpus.

ORDER

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED that Petitioner's request for an show cause order directed to the State of Washington and related order for telephonic hearing, if any, be, and hereby is, DENIED; and it is further

ORDERED, ADJUDGED AND DECREED that said Petition of Writ of Habeas Corpus be, and hereby is, DISMISSED with prejudice; and it is further

ORDERED, ADJUDGED AND DECREED that said Petition of Writ of Habeas Corpus is found to be frivolous under RCW 4.24.430.

Dated this 9 day of December, 2013.

JUDGE

BRUCE A. SPANNER

C

Court of Appeals of Washington,
Division 2.
STATE of Washington, Respondent,
v.
Frank Alexander WALLMULLER, Appellant.

No. 40186–0–II.
Nov. 15, 2011.

Background: Defendant was convicted by jury in the Superior Court, Mason County, Amber L. Finlay, J., of five counts of first degree child rape, and four counts of sexual exploitation of a minor Defendant appealed.

Holding: The Court of Appeals, Penoyar, C.J., held that trial court's failure to instruct jury that it had to find a separate and distinct act for each of three counts of rape and two counts of sexual exploitation of a minor in order to convict on these counts did not violate defendant's double jeopardy rights.

Affirmed.

West Headnotes

[1] Double Jeopardy 135H ⇐148

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk148 k. Sex offenses; obscenity. Most Cited Cases

Trial court's failure to instruct jury that it had to find a separate and distinct act for each of three counts of first-degree child rape and two counts of sexual exploitation of a minor in order to convict on these counts did not violate defendant's double jeopardy rights, as it was manifestly apparent to jury that each count represented a separate act; with regard to rape counts, victim testified to two acts of intercourse near school and one act of intercourse near athletic center, in closing, state informed jury that acts of oral sex and digital penetration near school and act of oral sex near center were the three acts of intercourse that corresponded to three counts in complaint, and that each count of rape was based on a separate and distinct act, and on exploitation counts, victim and defendant identified themselves as the individuals in videos, and state informed jury in closing, that these exploitation counts involved separate acts. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[2] Double Jeopardy 135H ⇐5.1

135H Double Jeopardy
135HI In General
135Hk5 Prohibition of Multiple Proceedings or Punishments
135Hk5.1 k. In general. Most Cited Cases

The Double Jeopardy Clauses of the Federal and State Constitutions protect individuals from being punished multiple times for the same offense. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[3] Criminal Law 110 ⇐1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

Appellate court reviews double jeopardy claims de novo. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

**941 Patricia Anne Pethick, Attorney at Law, Tacoma, WA, for Appellant.

Timothy W. Whitehead, Mason County, Timothy J. Higgs, Mason Co. Pros. Aty. Office, Shelton, WA, for Respondent.

OPINION PUBLISHED IN PART

PENOYAR, C.J.

*891 ¶ 1 A jury convicted Frank Wallmuller of five counts of first degree child rape (counts I, II, III, IV, and V) and four counts of sexual exploitation of a minor (counts VI, VII, VIII, and XII). He appeals three convictions of first degree child rape (counts III, IV, and V) and two convictions of sexual exploitation of a minor (counts VI and VIII), arguing that the trial court violated his right to be free from double jeopardy by failing to instruct the jury that it had to *892 find that a separate and distinct act supported each of these counts. Additionally, he appeals his conviction of count XII, arguing that the State violated his rights under the Sixth Amendment and article I, section 22 of the state constitution by failing to inform him of the "nature and cause of the accusation" against him. Finally, in his statement of additional grounds (SAG),[FN1] he appeals all his convictions, arguing that the trial court lacked subject matter jurisdiction. We affirm.

FN1. RAP 10.10.

FACTS

¶ 2 On January 29, 2008, police officers executed a search warrant at Wallmuller's residence. Inside, they discovered a cell phone containing: a video of a girl lifting her sweater and revealing her breasts, with a date stamp of December 29, 2006 (video 3); a video of a girl performing oral sex on an adult male, with a date stamp of June 18, 2006 (video 8); a video of the same girl from video 8 performing oral sex on an adult male, with a date stamp of June 16, 2006 (video 9); and a video of a girl exposing her genital area, with a date stamp of June 16, 2006 (video 10).

¶ 3 Police ultimately identified SS (born 1992) as the girl in video 3 and TKO (born 1995) as the girl in videos 8, 9, and 10. After further investigation, the State charged Wallmuller, by first amended information, with five counts of first degree rape[FN2] of TKO (counts I, II, III, IV, and V),[FN3] three counts of sexual exploitation of a minor involving TKO (counts VI, VII, VIII), and one count of sexual exploitation of a minor involving SS (count XII).[FN4] Count XII alleged that *893 the crime involving SS occurred "on or about the period between the 1st day of February, 2007, and the 15th day of March, 2007." Clerk's Papers (CP) at 200.

FN2. RCW 9A.44.073.

FN3. RCW 9.68A.040.

FN4. The State also charged Wallmuller with three additional counts (counts IX, X, and XI) related to a different victim and one additional count (count XIII) related to SS. The trial court dismissed counts X and XI for insufficient evidence, and the jury acquitted Wallmuller of counts IX and XIII.

¶ 4 At trial, TKO identified herself as the girl in videos 8, 9, and 10, and she identified Wallmuller as the man. SS identified herself as the girl lifting her sweater in video 3. Wallmuller testified that he filmed videos 8, 9, and 10, but he denied filming SS lifting up her sweater. He confirmed that videos 8 and 9 showed TKO performing oral sex on him and that video 10 showed TKO's exposed genital area. Wallmuller explained that he did not make these videos for the purposes of sexual gratification but because TKO "told [him] to." Report of Proceedings (RP) at 1408.

¶ 5 TKO testified that, on another occasion, Wallmuller drove her to a location near Southside School in Mason County. Near the school, he stopped the car, zip-tied her hands as she sat in the front passenger seat, and forced her to perform oral sex. He also inserted his finger into her vagina. Afterwards, he drove her to the Shelton Athletic **942 Center, parked, and again forced her to perform oral sex. At trial, Wallmuller denied that these acts occurred.

¶ 6 Before resting, the State moved to amend the first amended information with regard to count

XII. First, because SS had testified to a "completed offense," the State moved to amend the count from a crime of attempt to a completed offense. RP at 1282. Wallmuller did not object; he stated that he thought count XII had always charged a completed crime. Second, because trial testimony indicated that video 3 had been created on December 29, 2006, the State moved to substitute December 15, 2006 for February 1, 2007 as the earliest possible date of the crime's commission. Wallmuller objected, arguing that "probable cause" did not support the amendment and that the State should be required to "narrow ... down" the date range for the crime. RP at 1283–84. In an oral ruling, the trial court granted the State's motion, ruling that the evidence supported both amendments and that the amendments did not prejudice *894 Wallmuller. FN5 The State did not file a written copy of the second amended information.

FN5. Wallmuller openly acknowledged that the amendment to the date range did not prejudice him; he informed the trial court that he had learned during a pre-trial interview that video 3 had been created "during the Christmas season." RP at 1285.

¶ 7 Over Wallmuller's exception, the trial court gave the following pattern instruction: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." FN6 CP at 68; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 3.01, at 80 (3d ed. 2008) (WPIC). At both parties' request, the trial court also gave a unanimity instruction for counts III, IV, and V. FN7 The trial court denied Wallmuller's request for a unanimity instruction for counts VI, VII, and VIII.

FN6. In his exception, Wallmuller asked the court to substitute "influence" for "control" in order to prevent the latter term from misleading the jury. RP at 1337–38.

FN7. The unanimity instruction for these counts read:

> There are allegations that the defendant committed the acts of rape of a child in the first degree with respect to [TKO] on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.
>
> CP at 73; *see also* WPIC 4.25, at 110.

¶ 8 The trial court gave the jury three separate to-convict instructions on counts III, IV, and V (first degree child rape). With the exception of the count number, these instructions were identical and read in relevant part:

> To convict the defendant of the crime of rape of a child in the first degree as charged in Count [III, IV, or V], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the period between the 1st day of January, 2006, and the 31st day of December, 2006, the defendant had sexual intercourse with [TKO].
>
> CP at 76–78.

*895 ¶ 9 The trial court gave the jury two separate to-convict instructions on counts VI and VIII (sexual exploitation of a minor). With the exception of the count number, these instructions were identical and read in relevant part:

> To convict the defendant of the crime of sexual exploitation of a minor as charged in Count [VI or VIII], each of the following three elements must be proved beyond a reasonable doubt:
>
> (1) That on or about the 16th day of June, 2006,

the defendant compelled, aided, invited, employed, authorized, or caused a minor, [TKO], to engage in sexually explicit conduct.

CP at 84, 86. The to-convict instruction for count VII was not identical because it included the date of June 18, 2006.

¶ 10 In closing argument, the State told the jury that the acts of oral sex in video 9 (from June 16, 2006) and video 8 (from June **943 18, 2006) constituted counts I and II, respectively. The State told the jury that the acts of oral sex and digital penetration near Southside School corresponded to counts III and IV and that the act of oral sex near Shelton Athletic Center corresponded to count V. The State then explained to the jury, "The acts are separate and distinct. There are five separate and distinct acts that the State has alleged that the defendant committed." RP at 1560.

¶ 11 With regard to the three sexual exploitation of a minor counts involving TKO (counts VI, VII, and VIII), the State told the jury that the creation of video 9 constituted count VI, the creation of video 8 constituted count VII, and the creation of video 10 constituted count VIII. The State emphasized that each count involved a different act.

¶ 12 The jury convicted Wallmuller on counts I, II, III, IV, V, VI, VII, VIII, and XII. He appeals.

*896 ANALYSIS

I. Double Jeopardy

[1] ¶ 13 Wallmuller argues that the trial court violated the double jeopardy clauses of the state and federal constitutions by failing to instruct the jury that it had to find a separate and distinct act for each of the three challenged counts of first degree child rape (counts III, IV, and V) and each of the two challenged counts of sexual exploitation of a minor (counts VI and VIII). We disagree.

[2][3] ¶ 14 The double jeopardy clauses of the state and federal constitutions protect individuals from being "punished multiple times for the same offense." *State v. Linton*, 156 Wash.2d 777, 783, 132 P.3d 127 (2006); *see* U.S. Const. amend. V; Wash. Const. art. I, § 9. We review double jeopardy claims de novo. *State v. Mutch*, 171 Wash.2d 646, 661–62, 254 P.3d 803 (2011).

¶ 15 While Wallmuller's appeal was pending, our Supreme Court issued *Mutch*, a case that directly impacts his double jeopardy claim. We ordered the parties to provide supplemental briefing on *Mutch*'s application to the facts of this case. In *Mutch*, a jury convicted the defendant, in relevant part, of five counts of second degree rape. 171 Wash.2d at 652, 254 P.3d 803. The victim testified that the defendant forced her to engage in five distinct episodes of assault that each included oral sex and vaginal intercourse over the course of a night and the next morning. *Mutch*, 171 Wash.2d at 651, 254 P.3d 803. Like the trial court in the present case, the trial court in *Mutch* gave separate but "nearly identical" to-convict instructions [FN8] for the five rape counts and a "separate crime is charged in each count" instruction. 171 Wash.2d at 662, 254 P.3d 803. Also, like the trial court in the present case, the trial court in *897 *Mutch* did not give a "separate and distinct" act instruction. 171 Wash.2d at 663, 254 P.3d 803.

FN8. Specifically, each to-convict instruction stated that the alleged rape occurred between "the 2nd day of February, 1994 and the 3rd day of February, 1994." *Mutch*, 171 Wash.2d at 662, 254 P.3d 803.

¶ 16 Relying on two previous decisions by the court of appeals, the *Mutch* court held that these instructions were "flawed" because they did not include a "separate and distinct" act instruction. 171 Wash.2d at 663, 254 P.3d 803 (citing *State v. Carter*, 156 Wash.App. 561, 234 P.3d 275 (2010); *State v. Berg*, 147 Wash.App. 923, 198 P.3d 529 (2008)). But the *Mutch* court stated that this flaw did not necessarily constitute a double jeopardy violation:

[F]lawed jury instructions that permit a jury to

convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense.... While the Court of Appeals in both *Berg* and *Carter* recognized that the faulty jury instructions created only the possibility of a double jeopardy violation, it did not look beyond the jury instructions or engage in further inquiry. We disapprove of such limited review.

171 Wash.2d at 663–64, 254 P.3d 803 (citations omitted).[FN9]

FN9. In its discussion, the *Mutch* court held that the "separate crime is charged in each count" instruction did not "sav[e]" a potential double jeopardy violation. *See* 171 Wash.2d at 663, 254 P.3d 803.

**944 ¶ 17 The *Mutch* court explained that we should look at "the entire trial record" when reviewing this type of double jeopardy claim. 171 Wash.2d at 664, 254 P.3d 803. A double jeopardy violation occurs if it was not "*manifestly apparent* to the jury" from the evidence, arguments, and instructions that "the State [was] not seeking to impose multiple punishments for the same offense and that each count was based on a separate act."[FN10] *Mutch*, 171 Wash.2d at 664, 254 P.3d 803 (internal quotation marks omitted) (alterations in original) (quoting *Berg*, 147 Wash.App. at 931, 198 P.3d 529).

FN10. The *Mutch* court stated that the case before it did not "provide an occasion for us to determine the exact review process for double jeopardy claims arising out of jury instructions." 171 Wash.2d at 665, 254 P.3d 803. Accordingly, the *Mutch* court did not explicitly decide whether the trial court's instructions were (1) not erroneous in light of the entire record, or (2) erroneous but harmless under the constitutional harmless error standard. 171 Wash.2d at 664–65, 254 P.3d 803.

*898 ¶ 18 Applying these standards, the *Mutch* court observed that the case before it "present[ed] a rare circumstance where, despite deficient jury instructions, it is nevertheless manifestly apparent that the jury found [Mutch] guilty of five separate acts of rape to support five separate convictions." 171 Wash.2d at 665, 254 P.3d 803. The court based its conclusion on the following circumstances: (1) The information charged the defendant with five counts "based on allegations that constituted five separate units of prosecution"; (2) the victim testified to five separate episodes of rape, which was the exact number of "to convict" instructions given to the jury; (3) the defense's cross-examination of the victim focused on the issue of consent, not on the number of alleged sexual acts that occurred; (4) a detective testified that the defendant had admitted to engaging in "multiple sexual acts" with the victim; (5) the State discussed all five episodes of rape in its arguments; and (6) the defense argued that the victim consented and that she was not credible to the extent that she denied consenting, rather than arguing that the State presented insufficient evidence as to the number of alleged sexual acts or questioning the victim's credibility regarding the number of rapes. *Mutch*, 171 Wash.2d at 665, 254 P.3d 803. Accordingly, the *Mutch* court concluded: "In light of all this, we find that it was manifestly apparent to the jury that each count represented a separate act; if the jury believed [the victim] regarding one count, it would as to all." 171 Wash.2d at 665–66, 254 P.3d 803.

¶ 19 Applying the principles in *Mutch* to the present case, we conclude that the trial court did not violate Wallmuller's double jeopardy rights with regard to the three challenged rape counts (counts III, IV, and V) or the two challenged sexual exploitation of a minor counts (counts VI and VIII).[FN11] With regard to the rape counts, TKO testified to two acts of *899 intercourse near the Southside School and one act of intercourse near the Shelton Athletic Center. In closing, the State informed the

jury that the acts of oral sex and digital penetration near Southside School and the act of oral sex near Shelton Athletic Center were the three acts of intercourse that corresponded to counts III, IV, and V. The State explicitly told the jury that each count of rape was based on a "separate and distinct" act. RP at 1560. With regard to the exploitation counts, TKO and Wallmuller identified themselves as the individuals in videos 9 and 10. The State informed the jury in closing argument that counts VI and VIII involved separate acts. Accordingly, in our view, it was manifestly apparent to the jury that each count represented a separate act and that it could not convict Wallmuller on a specific count of rape or exploitation without unanimously agreeing that he had committed the act that the State identified in closing argument as that count's underlying act. We therefore reject his double jeopardy challenge.

FN11. Although the *Mutch* court referred to the circumstances there as "rare," that apparently was not a dispositive factor in that case. 171 Wash.2d at 665, 254 P.3d 803. Thus, we do not ascertain whether the circumstances in this case are also "rare."

**945 ¶ 20 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

******UNPUBLISHED TEXT FOLLOWS******

II. Sexual Exploitation of a Minor (Count XII)

¶ 21 Wallmuller also asks us to reverse his conviction on count XII because the State violated his constitutional right "to be informed of the nature and cause of the accusation" against him with regard to that count. Appellant's Br. at 9; U.S. Const. amend. VI; [FN12] Wash. Const. art. I, § 22. [FN13] We disagree.

FN12. "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation." U.S. Const. amend. VI.

FN13. "In criminal prosecutions, the accused shall have the right ... to demand the nature and cause of the accusation against him [and] to have a copy thereof." Wash. Const. art. I, § 22.

¶ 22 To support his argument, Wallmuller observes that the first amended information and the to-convict instruction differ for count XII. Specifically, (1) the first amended information alleges that he committed this crime between February 1, 2007, and March 15, 2007, whereas the to-convict instruction includes a time period from December 15, 2006, to March 15, 2007; and (2) the first amended information charges an attempted crime whereas the to-convict instruction contains the elements for a completed crime. This argument fails.

¶ 23 Before the State rested, the trial court granted the State's motion to amend the first amended information. The to-convict instruction for count XII accurately reflects these court-approved amendments. Because the orally amended information notified Wallmuller of the "nature and cause" of the accusation against him for count XII, there is no constitutional error.

¶ 24 In his supplemental brief, [FN14] Wallmuller suggests that when the State orally amended the information but did not file the resulting amended information with the trial court, the State violated his Sixth Amendment and article I, section 22 rights. Wallmuller cites no authority for this proposition, and we find none. Indeed, Division One of this court has held that a defendant waives his right to receive a written copy of an amended information when the State orally amends the charging period in the information and the defendant does not request a written copy of the resulting amended information. *State v. Newman*, 63 Wash.App. 841, 849, 822 P.2d 308 (1992). Furthermore, we note that Wallmuller openly admitted that neither of the State's amendments prejudiced him: He told the trial court that he knew that video

3 had been created "during the Christmas season," and he stated that he thought count XII already charged a completed crime. RP at 1285. No constitutional error occurred.

> FN14. We asked the parties to address this issue in greater detail in their supplemental briefs.

III. Statement of Additional Grounds

¶ 25 In his SAG, Wallmuller argues that the trial court did not have subject matter jurisdiction over his case because the enacting clauses and titles of the criminal statutes in the information do not appear in the printed volumes of the Revised Code of Washington. He contends that it is constitutionally insufficient for the enacting clauses and titles to appear in "other records or books." SAG at 10. According to Wallmuller, if a statute's enacting clause and title do not appear in the printed volumes of the Revised Code of Washington, the statute is not a "law[ ] of this State," SAG at 10, because it does not comply with the following provisions of the state constitution:

> STYLE OF LAWS. The style of the laws of the state shall be: "Be it enacted by the Legislature of the State of Washington." And no laws shall be enacted except by bill.
>
> BILL TO CONTAIN ONE SUBJECT. No bill shall embrace more than one subject, and that shall be expressed in the title.
>
> Wash. Const., art. II, §§ 18, 19.

¶ 26 Wallmuller misreads these sections of the state constitution. Neither mandates the inclusion of a statute's enacting clause or title in the printed volume of the Revised Code of Washington. Rather, these sections require the legislature to include an enacting clause and a title in a bill that it enacts. The legislature complied with these sections when it enacted the bills that are the basis for the statutes supporting Wallmuller's convictions—the first degree rape of a child statute, RCW 9A.44.073, and the sexual exploitation of a minor statute, RCW 9.68A.040. *See* Laws of 1989, ch. 32, at 161; Laws of 1988, ch. 145, at 561.

¶ 27 We affirm.

******END OF UNPUBLISHED TEXT******

We concur: HUNT and QUINN–BRINTNALL, JJ.

Wash.App. Div. 2,2011.
State v. Wallmuller
164 Wash.App. 890, 265 P.3d 940

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Supreme Court of Washington.
Frank A. WALLMULLER, Appellant,
v.
Jeffrey A. UTTECHT, Respondent.

No. 85400–9.
March 3, 2011.

Franklin County Superior Court, No. 10–2–51044–6.

ORDER

Frank Wallmuller filed a motion in this Court for an expenditure of public funds to enable him to appeal a superior court order dismissing his habeas corpus petition as frivolous. Department One of this Court, composed of Chief Justice Madsen, and Justices Charles Johnson, Chambers, Fairhurst, and Stephens, considered the motion at its March 1, 2011, Motion Calendar and unanimously agreed that the superior court should have transferred the habeas corpus petition to the Court of Appeals for treatment as a personal restraint petition pursuant to CrR 7.8(c)(2), that the habeas corpus petition should therefore be transferred to this Court for treatment as a personal restraint petition, and that the petition should be dismissed as frivolous. Accordingly,

IT IS HEREBY ORDERED:

(1) The motion for expenditure of public funds is denied.

(2) The petition for a writ of habeas corpus is transferred to this Court for treatment as a personal restraint petition.

(3) The petition is dismissed.

For the Court

/s/ Madsen, C.J.

CHIEF JUSTICE

Wash.,2011.
Wallmuller v. Uttecht
171 Wash.2d 1016, 249 P.3d 1015

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